Supreme Court, U. S.
FILED
DEC 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-878

JAMES W. GILMARTIN, GILMARTIN DENTAL CORPORATION AND J. W. GILMARTIN, D.D.S., INC.,

Petitioners

v.

BOARD OF DENTAL EXAMINERS OF THE STATE OF CALIFORNIA,

Respondent.

On a Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

BRIEF FOR THE BOARD OF DENTAL EXAMINERS OF THE STATE OF CALIFORNIA IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	6
I. THE NAISMITH CASE WAS CORRECTLY DECIDED	6
EQUAL PROTECTION ANALYSIS BY NAISMITH COURT	8
II. THE APPLICABLE EQUAL PROTECTION ANALYSIS IS THE RATIONAL RELATIONSHIP TEST	9
III. PETITIONERS HAVE NOT BEEN DENIED DUE PROCESS BY CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 1658.1	12
CONCLUSION	15

TABLE OF AUTHORITIES CITED

Cases

	Page
D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1	8, 10
Idaho Dept. of Employment v. Smith (1977) 98 S.Ct. 327	13, 14
Naismith Dental Corp. v. Board of Dental Examiners (1977) 68 Cal.App.3d 253	4, 6, 7, 8, 9, 11
San Antonio School District v. Rodriquez (1973) 411 U.S. 1, 36	11
Semler v. Oregon State Board of Dental Examiners (1934) 294 U.S. 608	8
Varanelli v. Structural Pest Control Board (1969) 1 Cal.App.3d 217, 222	13
Wilke & Holzheiser, Inc. v. Dept. Alcoholic Bev. Control (1966) 65 Cal.2d 349, 358–359	13

Constitution

United States Constitution, Fourteenth Amendment Section 1	3

Statutes

California Business and Professions Code	
Section 1628	11
Section 1658	11
Section 1658.1	2, 3, 6, 8, 9, 10, 12
28 United States Code Section 1257, subdivision (3)	2

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On a Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

BRIEF FOR THE BOARD OF DENTAL EXAMINERS OF THE STATE OF CALIFORNIA IN OPPOSITION TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The California Board of Dental Examiners respectfully opposes the Petition for Writ of Certiorari,

filed herein on December 1, 1978, to review the judgment of the Court of Appeal of the State of California in and for the Third Appellate District entered in the above entitled case on July 12, 1978.

OPINIONS BELOW

The denial of the Petition for Hearing by the Supreme Court of the State of California is unreported and is printed in Appendix A to the Petition for a Writ of Certiorari. The opinion of the Court of Appeal of the State of California in and for the Third Appellate District is unreported and is printed in Appendix B to the Petition for a Writ of Certiorari.

JURISDICTION

Jurisdiction is invoked by petitioners pursuant to 28 United States Code section 1257, subdivision (3).

QUESTION PRESENTED

The constitutionality of Business and Professions Code section 1658.1 on "due process" and "equal protection" grounds.

STATUTE INVOLVED

California Business and Professions Code section 1658.1 provides:

> "On or after September 21, 1963, no dentist shall be granted permission for an additional place of practice, except that a dentist may be granted permission for more than one place of practice if he is in personal attendance at each place of practice at least fifty percent of the time during which such places of practice are open for the practice of dentistry."

The United States Constitution, Fourteenth Amendment, section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Pursuant to the provisions of California Business and Professions Code section 1658.1, a licensed dentist must obtain the written permission of respondent prior to opening any additional place of practice. Moreover, pursuant to California Business and Professions Code section 1658.1, no such authorization shall be granted unless the applicant dentist is in personal attendance at each place of practice at least 50 percent of the time during which such places of practice are open for the practice of dentistry.

On August 18, 1975, petitioners filed a Petition for Peremptory Writ of Mandate, Memorandum of Points and Authorities in Support of Petition for Peremptory Writ of Mandate and Notice of Motion for Peremptory Writ of Mandate in the Superior Court of the State of

California in and for the County of Sacramento.

On September 19, 1975, petitioners filed a Stipulation and Order taking petitioners' Motion for Peremptory Writ of Mandate off calendar.

On October 3, 1975, respondents filed a Return by way of Answer to Petition for Writ of Mandate and Alternative Writ of Mandate and Memorandum of Points and Authorities in Support Thereof.

On June 30, 1976, the Sacramento Superior Court ordered the trial continued for 120 days and ordered petitioners to file an application with respondent for a third office.

On July 20, 1976, petitioners made application to respondent for permission to open a third office to be located at 3018 J Street, Sacramento, California; a fourth office to be located at 7200 Hammer Lane, Stockton, California; and a fifth office to be located at 984 Lincoln Street, Auburn, California. On October 3, 1976, respondent denied petitioners' application because the petitioner, Dr. Gilmartin, would not be present in his third, fourth and fifth dental facilities at least fifty (50%) percent of the time that the office was open for the practice of dentistry.

On November 3, 1976, the trial proceedings continued and the matter was argued and submitted.

On November 8, 1976, the Sacramento Superior Court dropped the matter from the court's calendar pending the decision of the Court of Appeals First Appellate District in *Naismith Dental Corp.* v. *Board of Dental Examiners* (1977) 68 Cal.App.3d 253.

On June 9, 1977, the court on its own motion restored the matter to the court's calendar.

On June 28, 1977, the Sacramento Superior Court denied petitioners' Petition for Peremptory Writ of Mandate.

On July 1, 1977, petitioners filed a Notice of Request of Findings of Fact and Conclusions of Law.

On August 30, 1977, the court filed Findings of Fact and Conclusions of Law and its Judgment Denying the Petition for Writ of Mandate and discharging the Alternative Writ of Mandate.

On September 6, 1977, the court entered Notice of Entry of Judgment.

On September 16, 1977, petitioners filed a Notice of Appeal in the Court of Appeal of the State of California in and for the Third Appellate District.

On July 12, 1978, the Court of Appeal of the State of California, Third Appellate District issued its opinion affirming the Judgment of the Denial of the Peremptory Writ of Mandate. (See Appendix B attached to the Petition for a Writ of Certiorari.)

On September 7, 1978, the California Supreme Court denied the hearing in the matter entitled, *Gilmartin* v. *Board of Dental Examiners.* (See Appendix A attached to the Petition for a Writ of Certiorari.)

ARGUMENT IN OPPOSITION TO THE PETITION

ARGUMENT

I

THE NAISMITH CASE WAS CORRECTLY DECIDED

In the present action petitioners argue that Business and Professions Code section 1658.1 is unconstitutional because it violates the equal protection and due process clause of the United States Constitution. This issue was resolved against petitioners by the Alameda County Superior Court and affirmed by the Court of Appeal, First Appellate District in *Naismith Dental Corp.* v. *Board of Dental Examiners, supra*, 68 Cal.App.3d 253 and the Sacramento Superior Court and affirmed by the Court of Appeal, Third Appellate District in *James W. Gilmartin, et al.* v. *Board of Dental Examiners of the State of California.*

The *Naismith* court correctly ruled that there was not a denial of due process of law. The court reasoned as follows:

> "We observe that the ultimate responsibility for the care and treatment of patients of a dental office rests upon its proprietorship, whether a professional corporation, partnership or an individual. Adverting to section 1658.1, it is logically permissible to infer a valid public purpose that the proprietary and licensed head of such an office maintain a reasonably close and direct supervision over its professional employees and operations. This purpose may be given effect by a requirement that such proprietary

and licensed head be in personal attendance at the office 'at least 50 percent of the time' during which it is 'open for the practice of dentistry.' The foregoing, in our opinion, 'might rationally have [been] accepted [by the Legislature] as the basis for a finding of public interest,' and thus section 1658.1 was not in contravention of the 'due process' clauses. We make no determination, of course, whether or not there were other valid reasons apparent to the Legislature from its expertise and study which it might likewise have accepted as bases for the statute.

"We note also the provisions of title 16, section 1060, of the California Administrative Code: 'The purpose of the rules of this article is to carry out the provisions of Article 3.5 [which includes Bus. & Prof. Code § 1658.1] of the Dental Practice Act and to facilitate, encourage and protect the public health. It is intended to preserve a close personal relationship between the applicant dentist and his patients at any additional office by preventing a division between the business and professional sides of the said dental practice and by fostering a unity of ownership, management, and substantial direct proprietor supervision and control over the operative side of the practice.' Although not binding on the courts, such a construction of a statute by the administrative agency charged with its enforcement is entitled to great weight. (*Coca-Cola Co.* v. *State Bd. of Equalization*, 25 Cal.2d 918, 921.)" (*Naismith Dental Corp.* v. *Board of Dental Examiners, supra*, 68 Cal.App.3d 253 at pp. 259–260.)

EQUAL PROTECTION ANALYSIS BY NAISMITH COURT

The *Naismith* court applied the "rational relationship" test because in the court's opinion the practice of dentistry neither touches upon a fundamental interest nor is its legislative classification "suspect".

Under the criterion established by *D'Amico* v. *Board of Medical Examiners* (1974) 11 Cal.3d 1 the court concluded that Business and Professions Code section 1658.1 bears some "rational relationship to a conceivable legitimate state purpose." (*Naismith Dental Corp.* v. *Board of Dental Examiners, supra,* 68 (Cal.App.3d 253.)

Appellant in *Naismith* argued, as petitioner Gilmartin argues here, that there is no rational basis for distinguishing between dentists and other healing arts with respect to the number of offices the practitioner may operate. The *Naismith* court relied on this court's decision in *Semler* v. *Oregon State Board of Dental Examiners* (1934) 294 U.S. 608 as follows:

> "The contention is squarely answered by *Semler* v. *Dental Examiners*, 294 U.S. 608, 610 [79 L.Ed. 1086, 1089, 55 S.Ct. 570], where the court found that Semler, also a dentist, had no 'ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each.' It has also been said by the high court that 'A statute is not invalid under the Constitution because it might have gone farther than

> it did' (*Roschen* v. *Ward*, 279 U.S. 337, 339 [73 L.Ed. 722, 729, 49 S.Ct. 336]); and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 [99 L.Ed. 563, 573, 75 S.Ct. 461]). California's courts are in agreement: '. . . "The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident." ' (*In re Ricky H.*, 2 Cal.3d 513, 521–522 [86 Cal.Rptr. 76, 468 P.2d 204]; and see *Norsco Enterprises* v. *City of Fremont*, 54 Cal.App.3d 488, 498 [126 Cal.Rptr. 659].)" (*Naismith Dental Corp.* v. *Board of Dental Examiners, supra*, 68 Cal.App.3d 253 at p. 262.)

The rationale of the *Naismith* decision is controlling. It is not for a court to question the wisdom of Business and Professions Code section 1658.1. The determination of the wisdom and public purpose of a statute are best left to the Legislature. Petitioners' arguments are properly addressed to the Legislature, not this court.

II

THE APPLICABLE EQUAL PROTECTION ANALYSIS IS THE RATIONAL RELATIONSHIP TEST

In reviewing the constitutionality of economic and social welfare legislation, courts have applied two tests. The first is the rational relationship test.

This test manifests restraint by the judiciary in

relation to the discretionary act of a co-equal branch of government and thereby invests such legislation with a presumption of constitutionality and requires merely that classifications drawn bear some rational relationship to a conceivable legitimate state purpose. So long as such classifications do not permit one to exercise a privilege while refusing it to another of like qualifications, under like conditions and circumstances, they are not objectionable under equal protection standards. (*D'Amico* v. *Board of Medical Examiners*, *supra*, 11 Cal.3d 1, 16.) "Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it.*" (*Id.* at p. 17.) (Court added emphasis.)

This test is traditionally applied in cases involving occupational licensing, including those concerning the healing arts. (*Id.* at p. 17.)

The second test is the strict scrutiny test. Here, the courts adopt an attitude of active and critical analysis. This test is applied in cases involving suspect classifications or touching upon fundamental interests. Moreover, the state bears the burden of establishing that it has a compelling interest which justifies the law and that the classifications drawn are necessary to further its purpose. (*Id.* at p. 17.)

Petitioners, here, assail Business and Professions Code section 1658.1. That section provides:

> "On or after September 21, 1963, no dentist shall be granted permission for an additional place of practice, except that a dentist may be granted permission for more than one place of practice if he is in personal attendance at each place of practice at least 50 percent of the time during which such places of practice are open for the practice of dentistry."

The class of persons that statute applies to is dentists. That classification is based upon the type of licensure held (see Bus. & Prof. Code § 1658), which in turn is based upon the type and content of education attained. (See Bus. & Prof. Code § 1628: Eligibility of Applicant for Licensure.) The classification involved here is one of professional licensure and the statute applies equally to all members of the classification.

The *Naismith Dental Corp.* v. *Board of Dental Examiners*, *supra*, 68 Cal.App.3d 253 court held there were no fundamental interests or suspect classifications involved and applied the rational relationship test. (*Naismith*, *supra*, at pp. 261–262.)

Petitioners contend that it was erroneous to apply this test and that the applicable standard of review was the strict scrutiny test.

Petitioner, Dr. Gilmartin, is subject to the operative effect of Business and Professions Code section 1658.1 solely by virtue of his occupational license as a dentist.

Equally without merit is petitioners' contention that in determining the appropriate constitutional standard, the inquiry should be whether the right is vested not fundamental.

The applicable analysis for determining the appropriate equal protection standard in defining a fundamental interest is set down by this court in *San Antonio School District* v. *Rodriquez* (1973) 411 U.S. 1, 36.

This court held that in determining if a right claimed is fundamental so as to involve strict scrutiny the court must determine whether such right is explicitly or implicitly guaranteed by the Constitution. (*Id.* at p. 33.)

It is respectfully submitted that there is no right explicitly or implicitly guaranteed by the Constitution to expand one's dental practice nor have petitioners directed this court to any such particular portion of the Constitution.

There is a rational basis for Business and Professions Code section 1658.1. The ultimate responsibility for the care and treatment of dental patients rests upon the dental office proprietor. Thus, it is a valid public purpose for the Legislature to require the proprietary and licensed head of such an office to maintain reasonably close supervision over its operations and professional employees. This purpose is given effect by the requirement that such proprietary and licensed head be in personal attendance at the office "at least 50 percent of the time" during which it is "open for the practice of dentistry."

III

PETITIONERS HAVE NOT BEEN DENIED DUE PROCESS BY CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 1658.1

In determining the constitutionality of regulatory legislation under due process consideration when any fact or facts appear or may be hypothesized which the Legislature might rationally have accepted as the basis

for a finding of public interest, the statute meets the test of reasonableness. (*Varanelli* v. *Structural Pest Control Board* (1969) 1 Cal.App.3d 217, 222 and cases cited therein.)

Moreover, before the court declares the act of a coordinate branch of government unconstitutional, such conflict must be clear, positive and unquestionable. (*Varanelli* v. *Structural Pest Control Board, supra,* 1 Cal.App.3d 217 at p. 220; *Wilke & Holzheiser, Inc.* v. *Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 358–359.)

This court's recent decision in *Idaho Dept. of Employment* v. *Smith* (1977) 98 S.Ct 327, is of interest. In that case this court held that an Idaho statute granting unemployment benefits to night students, but denying such benefits to otherwise eligible persons who attend school during the day, did not deny equal protection. This court stated as follows:

> "The holding below misconstrues the requirements of the Equal Protection Clause in the field of social welfare and economics. This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits: 'If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ' *Dandridge* v. *Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970), quoting *Lindsley* v.

Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). See also *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); *Mathews* v. *DeCastro*, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976); *Jefferson* v. *Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972). The legislative classification at issue here passes this test. It was surely rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining full-time employment than does attending school at night. In a world of limited resources, a State may legitimately extend unemployment benefits only to those who are willing to maximize their employment potential by not restricting their availability during the day by attending school. Moreover, the classification serves as a predictable and convenient means for distinguishing between those who are likely to be students primarily and part-time workers only secondarily and thus ineligible for unemployment compensation and those who are primarily full-time workers and students only secondarily without the necessity of making costly individual eligibility determinations which would deplete available resources. The fact that the classification is imperfect and that the availability of some students desiring full-time employment may not be substantially impaired by their attendance at daytime classes does not, under the cases cited *supra*, render the statute invalid under the United States Constitution." (*Idaho Dept. of Employment* v. *Smith*, *supra*, 98 S.Ct. 327 at p. 328.)

This court should defer to the legislative determination concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits.

CONCLUSION

The Court should Order that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DATED: DEC 26 1978

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